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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

In re,

Debtor.

DEBTOR'S OBJECTION TO PROOF
OF CLAIM SUBMITTED BY
BANK OF NEW YORK MELLON.

Christopher M. Klein

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DEBTOR'S OBJECTION TO THE PROOF OF CLAIM
FILED ON MAY 17, 2013, CLAIM NUMBER 6-1 PART 2, SUBMITTED BY THE
BANK OF NEW YORK MELLON FKA THE BANK OF NEW YORK, AS TRUSTEE
FOR THE CERTIFICATE HOLDERS OF THE CWALT, INC., ALTERNATIVE
LOAN TRUST 2006-OA10 MORTGAGE PASS-THROUGH CERTIFICATES, SERIES
2006-OA10

I. INTRODUCTION

COMES NOW, J. PEDRO ZARATE, Debtor, and files this Objection to Allowance of Proof of Claim as filed by Creditor THE BANK OF NEW YORK MELLON FKA THE BANK OF NEW YORK, AS TRUSTEE FOR THE CERTIFICATE HOLDERS OF THE CWALT, INC., ALTERNATIVE LOAN TRUST 2006-OA10 MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-OA10 ("Claimant").

A. To Uphold and Maintain the Integrity of the Courts and the Judicial System, Exact and Concrete Evidence is Required to Show That the Claimant is a Party With Standing to Make the Proof of Claim.

Without adequate proof that the Claimant is the proper lawful party entitled to receive payment, it becomes a guessing game whether the Debtor/Borrower has received or will receive credit for his Promissory Note payments. To date the Claimant has not shown credible and lawful proof of its right to receive payment.

The presumption by the courts that the banks have acted lawfully and make lawful allegations of authority when it submits a Proof of Claim can no longer obtain. Support for the banks when the banks make unsupported claims in their attempts to enforce the Notes and Deeds

1 of Trust without evidence to show they are legally entitled must end.¹

2 Basic precepts of law and equity dictate that only the party who is legally entitled to
3 contractual consideration be allowed to collect on the obligation to the tender consideration or to
4 enforce contractual obligations. No less than Article III of the Constitution of the United States
5 requires that there be a “case or controversy” between parties, that the enforcement of contractual
6 obligations must be by one who has a “stake” in the outcome. If this elemental principle of law
7 and fairness, this elemental principle of “standing” is not observed by the courts, the integrity of
8 our judicial system becomes severely challenged and diminished. It was written:
9

10 This Court acknowledges the right of banks, holding valid mortgages, to receive timely
11 payments. And, if they do not receive timely payments, banks have the right to properly file
12 actions on the defaulted notes—seeking foreclosure on the property securing the notes. Yet,
13 this Court possesses the independent obligations to preserve the judicial integrity of the federal
14 court and to jealously guard federal jurisdiction. Neither the fluidity of the secondary mortgage
15 market, nor monetary or economic consideration of the parties, nor the convenience of the
16 litigants supersedes those obligations . . . [u]nlike . . . [s]tate law and procedure, as [p]laintiffs
17 perceive it, the federal judicial system need not, and will not, be “forgiving in this regard.” *In*
18 *re Foreclosure Cases*, 521 F. Supp. 2d 650, 653 (S.D. Oh. 2007) (Emphasis added by Debtor.)
19 (See (2012) 41 Stetson L.Rev. 745)

20 Debtor understands the foreclosure efforts of a true “beneficiary” or its legitimate agent(s)
21 and/or “successors in interest”, but he would be foolish to support the efforts of this Claimant
22 until such time this Claimant is able to satisfactorily prove its authority, Due Process and Standing
23 to collect on the debt.

24 Because of the actions of lender and the lenders’ agents and successors in interest, and the
25 confusion left in the wake of these parties’ rush to profit through “securitization”, the banks in
26 the secondary market have failed to specifically comply with the unbroken “chain of title”

27 ¹(2012) 41 Stetson L.Rev. 745 (Exhibit H.)

1 requirement and the requirements of the Internal Revenue Code §§ 860A-G, the law that allows
2 securitization when its provisions are strictly complied with. The plan of the Internal Revenue
3 Code to create and implement securitization requires that the process be punctiliously adhered to
4 or there is no securitization. The process itself defines securitization. Partial compliance of the
5 process of securitization leaves nothing. Securitization does not exist as the process is
6 securitization. Full compliance with the process of securitization produces securitization. Partial
7 compliance with the process gives you nothing.

9 Further, this doctrine of full compliance applies equally to standing found in the specific
10 applications of the Uniform Commercial Code and California Civil Code § 2924(a)(1), *et seq.*
11 Any application of the rule of standing in applying real property law and equity requires an
12 unbroken chain whether such chain is found in the "Grantee-Grantor" index to show chain of
13 ownership or in its application here to show chain of title. If the chain is broken, as is the issue
14 herein, it leaves the borrower to doubt whether the Claimant is the party with standing authority.
15 If no unbroken chain is found, it casts doubt as to whom the borrower is to pay or to whom he has
16 paid and whether such payments were properly applied to the Promissory Note.

19 As shown below, the banks' misfeasance to comport action to law in the alleged and
20 purported transfers and "assignments" of the Promissory Note, has left the Debtor in doubt as to
21 whom consideration should be paid as required by the Promissory Note.

23 The Debtor requests that before the Court allows the Claimant's claim herein, it
24 acknowledge the basic principle of law and require the Claimant to sufficiently show that it has
25 a stake in the controversy, that it has authority, standing, and followed de rules and procedures
26 to make its claim against the Debtor's estate.

1 Debtor alleges that the Claimant's Proof of Claim is deficient to prove its authority
2 to make the claim, because it cannot show an unbroken chain of title. Below the Debtor
3 will show either by way of common law principles, the Uniform Commercial Code, California
4 Civil Code §§ 2924, *et seq.*, and the Internal Revenue Code, that Claimant has failed to show that
5 it is the party with a legal right to make claim against the Debtor's estate. Debtor herein claims
6 and alleges that he owes nothing to this Claimant.
7

8 II. BACKGROUND

9 The following time sequence of relevant events may be helpful for a clear understanding
10 of the status of the parties and the mortgage herein:
11

12 • **February 2, 2006:** The Note, and Deed, were executed and the Deed was recorded on
13 February 14, 2006. The lender was Countrywide Bank, N.A., ("Countrywide"), and
14 CTC Foreclosure Services Corporation ("CTC") was named the trustee. Further, the
15 Deed showed that though the lender was Countrywide, it named MERS as the
16 nominee/ beneficiary. The loan consisted of a fully amortized thirty (30) year
17 adjustable rate note ("ARM") in the amount of \$595,000.00. (Please see Note attached
18 as Exhibit A, and Deed of Trust attached as Exhibit B.)
19

20 • **June 1, 2006. The Pooling and Servicing Agreement ("PSA")** (Exhibit D) was signed
21 completing the securitization of the PSA comprised of Notes and Deeds of Trusts and
22 Mortgages of which the Debtor's Note and Deed was allegedly a part. (Exhibits A and B)
23 The Lender was Countrywide Bank, N.A., the Sellers were Countrywide Home Loans,
24 Inc., Park Granada, LLC, Park Monaco Inc., and Park Sienna LLC. The Depositor was
25 CWALT, Inc., and the Master Servicer was Countrywide Home Loans Servicing LP, Bank
26
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1 of New York was named the Trustee.

2 • **June 3, 2008, Notice of Default.** This notice was filed with the county recorder's
3 office on June 4, 2008. MERS was the named beneficiary, and CTC was shown as the
4 Trustee. ReconTrust Company ("ReconTrust") was named the agent for the
5 beneficiary. The document was actually signed by an agent of LandSafe Title Corp., as
6 ReconTrust's Attorney in Fact. (Please see Notice of Default attached as Exhibit E.)

7 • **June 17, 2010: Substitution of Trustee and Assignment of Deed of Trust**
8 **("Assignment"). (Exhibit C)** One instrument included both the substitution of the trustee
9 and the purported "Assignment" of the Deed. This document was recorded on June 22,
10 2010. MERS, in its capacity as the "beneficiary" caused the substitution of ReconTrust
11 as the new trustee of the Deed replacing CTC, and purportedly "assigned" the Deed to the
12 Claimant Trustee of the PSA Trust. (Exhibit D.)

13 • **Undated Notice of Trustee's Sale.** Recorded on June 22, 2010. This instrument was
14 signed by an agent of ReconTrust. The named beneficiary was Bank of New York as
15 Trustee for the Certificate Holders CWALT, Inc. Alternative Loan Trust 2006-OA10
16 Mortgage Pass-Through Certificates, Series 2006-OA. The sales date was stated as July
17 14, 2010. (Please see Notice of Trustee's Sale attached as Exhibit F.)

18 • **August 1, 2011, Notice of Trustee's Sale.** Recorded on August 3, 2011. This instrument
19 was signed by an agent of ReconTrust. The named beneficiary was Bank of New York as
20 Trustee for the Certificate Holders CWALT, Inc. Alternative Loan Trust 2006-OA10
21 Mortgage Pass-Through Certificates, Series 2006-OA. The sales date was stated as August
22 26, 2011. (Please see Notice of Trustee's Sale attached as Exhibit G.)

1 **III. CLAIMANT'S EXHIBITS**

2 Claimant attached the following attachments in support of its alleged right to make claim
3 on the secured real property of the Debtor:
4

5 **MORTGAGE PROOF OF CLAIM ATTACHMENT**

6 Part 1: Statement of Principal and Interest Due as of the Petition Date

7 Part 2: Statement of Prepetition Fees, Expenses, and Charges

8 Part 3: Statement of Amount Necessary to Cure Default as of the Petition Date
9

10 **ATTACHMENT DOCUMENTS:**

11 Exhibit 1: Bank of America Home Loans Escrow Account Review

12 Exhibit 2: Adjustable Rate Note (with Prepayment Penalty Addendum)

13 Exhibit 3: Deed of Trust (with Adjustable Rate Rider)

14 Exhibit 4: SUBSTITUTION OF TRUSTEE AND ASSIGNMENT OF DEED OF
15 TRUST
16

17 **IV. NARRATIVE SUMMARY OF CREDITOR'S CLAIM AND EXHIBITS**

18 The Proof of Claim alleges it is a claim for "money loaned" and that it is secured in the
19 claim amount of \$817,514.26, by real estate described as 10826 Walmort Road, Wilton,
20 California Though Claimant fails to explain the inclusion of the "Substitution of Trustee and
21 Assignment of Deed of Trust" ("Assignment") (please see Substitution of Trustee and
22 Assignment of Deed of Trust attached as Exhibit B) as proof of right to make claim, it
23 apparently makes claim through the purported "assignment" of the Deed of Trust purportedly
24 "assigning" the Deed of Trust to Mortgage Electronic Registration Services, Inc. ("MERS")
25 (please see Deed of Trust attached as Exhibit B) and the follow-up purported "assignment"
26
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28

1 of the Deed of Trust from MERS to Claimant. (Exhibit E). In all likelihood, this makes sense
 2 only because of an attempt to make the Adjustable Rate Note ("Note") (please see Note
 3 attached as Exhibit A) a part of the *corpus* of an June 1, 2006, trust entitled "ALTERNATIVE
 4 LOAN TRUST 2006-OA10 MORTGAGE PASS-THROUGH CERTIFICATES, SERIES
 5 2006-OA10" ("PSA Trust") created by a pooling and servicing agreement ("PSA"). This
 6 purported "assignment" does not assign or otherwise transfer the Note, and hence does not in
 7 any manner assign or transfer the creditor status or rightful claimant status to Claimant. The
 8 documentation provided by Claimant with its claim provides absolutely no evidence it is the
 9 creditor or rightful claimant entitled to make claim against the Property.

12 V. DISCUSSION

13 **A. The Claimant Has Failed to Present Evidence Sufficient to Prove It Has a** 14 **Perfected a Security Interest in the Debtor's Property as Required by FRBP, Rule** 15 **3001(d).**

16
 17 A filed proof of claim is *prima facie* evidence of its validity and amount if it is
 18 executed and filed in accordance with the Federal Rules of Bankruptcy Procedure. FRBP, Rule
 19 3001(f). FRBP, Rule 3001(a)-(c) provides that a proof of claim must be in writing, be executed
 20 by the creditor or its authorized agent, and, when based on a writing, be filed with the original or
 21 a duplicate of that writing. FRBP, Rule 3001(a)-(c). If the creditor claims a security interest in the
 22 Debtor's property FRBP, Rule 3001(d) requires: "the proof of claim shall be accompanied by
 23 evidence that the security interest has been perfected." In the instant case we have an attorney
 24 without a Power of Attorney signing the proof of claim on behalf of the creditor with out
 25 checking any of the boxes to identify his authority, (Please see Registry Claim 6-1 Part 2 Proof
 26
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1 of Claim. as Exhibit I) Further, pursuant to 11 U.S.C. § 502(a), a claim “is deemed allowed,
2 unless a party in interest . . . objects.”

3 “‘Claim objectors carry the initial burden to produce some evidence to overcome the
4 rebuttable presumption of validity.’” *In re Koontz*, 2010 WL 5625883, 7-8 (Bankr. N.D. Ind.
5 2010) (quoting *In re Vanhook*, 426 B.R. 296, 298-99 (Bankr. N.D. Ill. 2010) (citations
6 omitted)). See also *In re Consumers Realty & Development Co., Inc.*, 238 B.R. 418, 422-423
7 (B.A.P. 8th Cir. 1999) (citing *Gran v. Internal Revenue Serv. (In re Gran)*, 964 F.2d 822, 827
8 (8th Cir. 1992)). “Once the objecting party produces evidence rebutting the claim, the burden
9 of proof shifts to the claimant to produce evidence establishing the validity of the claim. *In*
10 *re Gran. Id.* Thus, once an objection is made to the proof of claim, the ultimate burden of
11 persuasion as to the claim's validity and amount rests with the claimant.” *In re Consumers*
12 *Realty & Development Co., Inc.*, supra, at 423 (citing *In re Allegheny Int'l, Inc.*, 954 F.2d 167,
13 173-74 (3rd Cir.1992); *In re Harrison*, 987 F.2d 677, 680 (10th Cir.1993)).

14 B. Code Requirements

15 1. As Required by 11 U.S.C. § 501(a), the Claimant Cannot Show That
16 It is a Creditor as Defined by 11 U.S.C. § 101(10) Entitled to Make a Claim Against the
17 Debtor's Estate, and the Claim Must be Denied.

18 A creditor or an indenture trustee may file a proof of claim. An equity holder may file
19 a proof of interest.

20 11 U.S.C. §501(a) states:

21 (a) A creditor or an indenture trustee may file a proof of claim. An equity security holder may
22 file a proof of interest.

23 11 U.S.C. § 502(b) lists the allowable objections. However, it must be determined whether

1 Claimant is a “creditor”, as defined by code to be a proper party to make any claims at all.

2 Debtor contends that Claimant has not shown in its Proof of Claim that it is a “creditor”
3 as defined by code and consideration of the claim should be precluded by a determination that the
4 Claimant is not a “creditor”.
5

6 A “creditor” is “an entity that has a claim against the Debtor that arose at the time of or
7 before the order for relief concerning the Debtor.” 11 U.S.C § 101(10). A “claim” is a right to
8 payment or an equitable remedy, whether or not such right is contingent. *See* 11 U.S.C § 101(5).

9 The Claimant’s Proof of Claim herein does not produce the necessary evidence through
10 its attached documents to show that the Claimant is a 11 U.S.C § 101(10) “creditor”. The
11 attachments, the “Mortgage Proof of Claim Attachment”, the “Escrow Account Review”, the
12 “Adjustable Rate Note” (“Note”) and “Prepayment Penalty Addendum”, the “Deed of Trust”
13 (“Deed”) with “Adjustable Rate Rider”, and the “Substitution of Trustee and Assignment of Deed
14 of Trust”, do not evidence that the Debtor owes Claimant anything.
15

16 This documentation only describes that there existed an alleged “Assignment” (Exhibit
17 C) of the Deed from MERS to Claimant (a nullity, in that an “assignment” of a Deed alone is
18 void, as argued below, *See Carpenter v. Longan*, 83 U.S. 271, 274 (1872)). Claimant has
19 failed to present evidence showing that it is the owner, holder, or possessor of the Note. The
20 failure to attach documents which go to the heart of the defect in the claim, as well as the
21 presence/inclusion of attached documents that themselves amount to evidence of the claim’s
22 defect, will provide reason to disallow the claim. 4 Witkin Summary of California Law,
23 Secured Transaction in Real Property § 105 (10th ed). Succinctly, a claimant must show it has
24 a “pecuniary interest” in the underlying debt that gives rise to the claim in order to establish
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1 that the claimant is a "creditor". See *In re Sobczuk*, (9th Cir. BAP 2007) 369 BR 512, 517-518.

2 After consideration of "V. STANDING", below, Claimant requests that Claimant's Proof
3 of Claim be disallowed for failure to show that it is a "creditor" with a "pecuniary interest".

4 **2. Because the Claimant Cannot Show It Has Legal Authority to Make the**
5 **Claim, the Claim Is Unenforceable Against the Debtor Pursuant to 11 U.S.C. § 502(b).**
6

7 11 U.S.C. 502(b) sets forth the objections to the Proof of Claim allowed to the Debtor.

8 Notwithstanding "1", above, if the Court determines that Claimant is a creditor, then
9 Debtor makes the following arguments pursuant to 11 U.S.C. 502(b):

10 Debtor objects to the Proof of Claim pursuant to 11 U.S.C. 502(b)(1). It states:

11
12 (b) Except as provided in subsections (e)(2), (f), (g), (h) and (i) of this section, if such
13 objection to a claim is made, the court, after notice and a hearing, shall determine the amount
14 of such claim in lawful currency of the United States as of the date of the filing of the petition,
and shall allow such claim in such amount, except to the extent that—

15 (1) such claim is unenforceable against the Debtor and property of the Debtor, under any
16 agreement or applicable law for a reason other than because such claim is contingent or
unmatured;

17 Debtor contends that if Claimant is determined by this Court to be a "creditor" under 11
18 U.S.C. §501(a), its claim is nevertheless "unenforceable against the Debtor". This contention is
19 based on the Debtor's assertion that Claimant has not shown that it has established or now
20 maintains lawful authority to make the claim under federal or state law, and therefore, the claim
21 is unenforceable pursuant to 11 U.S.C. 502(b)(1). (See VI. STANDING, below.)
22

23 VI. STANDING

24 **A. Pursuant to the California Commercial Code ("CCC") and the Uniform**
25 **Commercial Code ("UCC"), Claimant Has Failed to Establish an Unbroken Chain of Title**
26 **That Establishes Constitutional Standing, and Prudential Standing, and It Cannot Show**
27

1 **Colorable Claim of Title to the Property.**

2 California has adopted the Federal Uniform Commercial Code.

3 As its first inquiry to determine a party's standing in the UCC context, the Court must
4 determine whether the party has constitutional standing, i.e., whether the party satisfies the "case
5 or controversy" requirement of Article III. *In re Jackson* 241 BR 21 (Bankr. E.D. Cal. 2011).
6 When a claimant fails to demonstrate it has any ownership interest or legal title to the claim being
7 asserted, the claimant fails to establish it has constitutional standing to bring the claim. *See Sprint*
8 *Communication Co. v. APCC Services, Inc.* 554 U.S. 269 (2008).
9

10 At a minimum, constitutional standing requires the Claimant to have suffered some actual
11 or threatened injury as a result of the Debtor's conduct, that the injury be traced to the challenged
12 action, and that it is likely to be redressed by a favorable decision. *Valley Forge Christian Coll.*
13 *v. Am. United for Separation of Church and State*, 454 U.S. 464, 472, (1982) [citations and
14 internal quotations omitted].
15

16 The Note was made payable to Countrywide Bank, N.A. (Countrywide). No record
17 document suggests that it has been indorsed to Claimant or any other named entity. The Deed of
18 Trust states that Countrywide is the beneficiary of the Deed. No record document suggests that
19 Countrywide transferred its beneficial interest to Claimant. The record shows that Countrywide
20 "assigned" the Deed to MERS without assigning the Note. This is insufficient. The Claimant has
21 presented no other documentary evidence to show that Claimant has suffered some actual or
22 threatened injury as a result of Debtor's conduct
23

24
25 The Ninth Circuit Court of Appeals' decision, *In re Veal*, [450 B.R. 897 (2011)
26 (9th Cir. BAP June 10, 2011)] ("*Veal*") stated that a federal court may exercise jurisdiction over
27

1 a litigant only when that litigant meets constitutional and prudential standing requirements.

2 Prudential standing “embodies judicially self-imposed limits on the exercise of federal
3 jurisdiction.” *Id.* at p. 906, (quoting *Elk Grove v. Newdow* 542 U.S. 1, 11 (2004)); *County of*
4 *Kern*, 581 F.3d 841, 845 (9th Cir. 2009). The Court in *Veal* described that prudential standing
5 principles “... generally provide that a party without the legal right, under applicable substantive
6 law, to enforce an obligation or seek a remedy with respect to it is not a real party in interest. *Id.*
7 at p. 907, citing *Doran v. 7-Eleven, Inc.*, 524 F.3d 1034, 1044 (9th Cir. 2008).

9 The facts in the *Veal* case show that a foreclosure sale had not yet occurred, and Wells
10 Fargo, the trustee of a pooling trust which contained the note, was seeking relief from stay to
11 conduct a non-judicial foreclosure sale of the property. The *Veal* Court approached the issue of
12 the requirements to obtain standing of a Movant who wished relief from the automatic stay. The
13 Court overruled the bankruptcy court’s ruling which lifted the stay as it applied to Wells Fargo.

15 It is the Debtor’s contention that Claimant has failed to satisfy the prudential standing
16 requirement, and, for that reason is unable to enforce its claim in federal court or state court
17 whether enforcement is sought through proofs of claim or causes of action.

19 The applicable substantive law begins with the Federal Rules of Civil Procedure, Rule
20 17(a)(1) which states:

21 “An action must be prosecuted in the name of the real party in interest.”

22 The *Veal* Court stated that in order to properly apply Rule 17(a)(1), it is necessary to
23 refer to Articles 3 and 9 of the Arizona Commercial Code² as the law to be applied to
24 determine whether the Movant is a real party in interest and meets the appropriate prudential
25

26
27 ² Arizona has adopted the Uniform Commercial Code as has California.

1 standing requirement. Article 3 provides a comprehensive set of rules governing the
2 obligations of parties on the Note, including how to determine who may enforce those
3 obligations and to whom those obligations are owed. *See* UCC § 3-102.

4 Though it is axiomatic that any attempt to assign the mortgage without the debt will
5 not pass the mortgagee's interest to the assignee. *In re Veal*, supra, at p. 916; *In re BNT*
6 *Terminals, Inc.*, 125 B.R. 963, 970 (Bankr. N.D. Ill. 1990), citing *Krueger v. Dorr*, 161
7 N.E.2d 433, 440-41 (Ill. App. Ct. 1959); *Moore v. Lewis*, 366 N.E.2d 594, 599 (Ill. App. Ct.
8 1977); *Commercial Prods. Corp. v. Briegel*, 242 N.E.2d 317, 321 (Ill. App. Ct. 1968); and
9 *Lundy v. Messer*, 167 N.E.2d 278, 279 (Ill. App. Ct. 1960).

10 Article 3 states that the ability to enforce a particular note is held by the "person entitled
11 to enforce" the note. It does not necessarily equate the proper person to be paid with the person
12 who owns the negotiable instrument. *Id.* at p. 909; UCC § 3-301. Nevertheless, there are at least
13 two ways in which a person can acquire "person entitled to enforce" status.

14 The first way requires that the person must be the "holder" of the Note. CCC § 3301(i).
15 A person is a holder if he possesses the note and either (1) the note has been made payable to the
16 person who has it in his possession, or (2) the note has been made payable to the bearer of the
17 note. CCC § 1201(b)(21)(A). This determination requires physical examination not only of the
18 face of the note but also of any endorsements. *In re Veal*, supra, at p. 911.

19 A second way involves the party attaining the status of a non-holder in possession of the
20 Note who has the rights of a holder. CCC § 3301(ii). *In re Veal*, supra, at p. 911.

21 Generally, a person becomes a non-holder in possession if the physical delivery of the
22 note to that person constitutes a "transfer" but not a "negotiation." Under the UCC, a "transfer"

1 of a negotiable instrument “vests in the transferee any right of the transferor to enforce the
2 instrument.” CCC § 3203(b). *In re Veal*, supra, at p. 911.

3 If a holder transfers the note to another person by a process not involving an Article 3
4 negotiation, e.g., a sale of notes in bulk without individual endorsement of each note – the
5 transferee obtains from the holder the right to enforce the note even if no negotiation takes place
6 and, thus, the transferee does not become an Article 3 “holder.” (But still in possession of the
7 Note.) See Comment 1 to CCC § 3203.

9 CCC § 3203(a) offers a definition of “transfer”. It states that a note is transferred
10 “when it is delivered by a person other than its issuer for the purpose of giving to the person
11 receiving delivery the right to enforce the instrument.” *In re Veal*, supra, at p. 911.

13 As a consequence, the failure to obtain the endorsement of the payee or other holder
14 does not prevent a person in possession of the note from being the “person entitled to enforce”
15 the note. However, without holder status and the attendant presumption of a right to enforce,
16 the possessor of the note must demonstrate both (1) the fact of the delivery and (2) the purpose
17 of the delivery of the note to the transferee in order to qualify as the “person entitled to
18 enforce.” *In re Veal*, supra, at p. 911.

20 If that owner/payee seeks either to use the note as collateral or sell the note outright to a
21 third party in a manner *not* within Article 3, Article 9 of the CCC governs that sale or loan
22 transaction and determines whether the purchaser of the note or creditor of the payee obtains a
23 property interest in the note. See CCC § 9109(a)(3). *In re Veal*, supra, at p. 913.

25 In the *Veal* case, the Court found that two assignments of the Note were insufficient.
26 Neither assignment was authenticated and one was not indorsed nor did it contain language
27

1 effectuating an assignment. The Court found that the second purported assignment was
2 insufficient under Article 9 to support a conclusion that the Movant held any interest,
3 ownership or otherwise, in the Note. *In re Veal*, supra, at pp. 917-918.

4 The *Veal* Court stated:

5
6 As a result, to show a colorable claim against the Property, Wells Fargo had to show that it
7 had some interest in the Note, either as a holder, as some other "person entitled to enforce," or
8 that it was someone who held some ownership or other interest in the Note. See *In re Hwang*,
438 B.R. 661, 665 (C.D. Cal. 2010) (finding that holder of note has real party in interest
status). *In re Veal*, supra, at p. 920.

9 In the instant case, none of the exhibits attached to the Claimant's Proof of Claim,
10 establish its status as the holder of the Note, as a "person entitled to enforce," or as an entity
11 with any ownership or other "colorable" interest in the Note. Further, the Claimant has failed
12 to submit evidence that the Note was endorsed to the Claimant or that it filed any kind of
13 action to enforce endorsement.
14

15 Further, the Proof of Claim submits no evidentiary proof to show that (1) Claimant
16 services the loan, (2) Claimant is a note holder in possession of the (original) promissory note,
17 (3) the promissory note is "either made payable to the Note holder or has been duly endorsed",
18 (4) Claimant is the note holder of the original mortgagee of the beneficiary or the assignee of
19 the Deed.
20

21 For the foregoing reasons, pursuant to the California Commercial Code, the Federal
22 Rules of Civil Procedure, and the Uniform Commercial Code, the Claimant has failed to
23 demonstrate it is a party in interest with standing to make its Claim.
24

25 **B. The Issue of Whether the Claimant Has Obtained Standing to Make this**
26 **Proof of Claim Is Moot Because the Stated Purpose Underlying the Motion Is to**
27
28

1 **Foreclose on Debtor's Property, and the Claimant Cannot Show Standing to Foreclose.**

2 **See "Basis for Asserting the Applicable Party has the Right to foreclose:" attached as an**
 3 **Exhibit to Claimant's Proof of Claim.**

4 Because the purported "Assignment" has not established an unbroken chain of title,
 5 Claimant cannot show that it is a "trustee, mortgagee, or beneficiary, or any of their authorized
 6 agents" required by California Civil Code ("CC") § 2924(a)(1), to allow it to initiate non-
 7 judicial foreclosure sale by filing and serving a lawful Notice of Default. Therefore, because
 8 Claimant cannot establish standing pursuant to CC § 2924(a)(1), and the requested relief from
 9 automatic stay has no purpose, and the Motion for Relief from Automatic Stay is moot.
 10

11 In the Ninth Circuit Court's decision in *In re Cedano*, [470 BR 522 (9th Circuit, BAP
 12 2012)], it determined that CC § 2924, *et seq.*, California's non-judicial foreclosure law,
 13 totally occupied the field to the exclusion of the UCC, the CCC, or other federal and State
 14 law. CC § 2924(a)(1) is the legal foundation to the defense that any foreclosing entity
 15 causing the Notice of Default to be filed and served must be a "mortgagee, trustee, or
 16 beneficiary, or an authorized agent(s)". Any claiming party, not a mortgagee, trustee, or
 17 beneficiary, or an authorized agent(s), violates the requirements found in CC § 2924(a)(1) and
 18 has no standing to initiate the foreclosure proceedings. *See In re Cedano*, supra, 470 BR 522;
 19 see also *Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1155, 121
 20 Cal.Rptr.3d 819.
 21

22 CC § 2924(a)(1) states:
 23

24 (1) The trustee, mortgagee, or beneficiary, or any of their
 25 authorized agents shall first file for record, in the office of the recorder of each county wherein
 26 the mortgaged or trust property or some part or parcel thereof is situated, a notice of default. . .
 27

1 In *Cedano* the Bankruptcy Appellate Panel of the Ninth Circuit Court of Appeals
2 discussed standing of a party to non-judicially foreclose on property under California law.

3 The *Cedano* court wrote in its opinion:

4 However, in the context of nonjudicial foreclosure sales, such as here, the Debtor's reliance on
5 Cal. Comm. Code § 3301 is misplaced. *Gardner v. Am. Home Mortg. Servicing, Inc.*, 691 F.
6 Supp. 2d 1192, 1202 (E.D. Cal. 2010); *Padayachi v. IndyMac Bank*, 2010 WL 4367221, at *3
7 (N.D. Cal. Oct. 28, 2010); *Castaneda v. Saxon Mortg. Servs., Inc.*, 687 F. Supp. 2d 1191,
8 1201 (E.D. Cal. 2009). Nonjudicial foreclosure sales are governed by Cal. Civ. Code § 2924.
9 *Castaneda*, 687 F. Supp. 2d at 1201; *Moeller v. Lien*, 25 Cal. App. 4th 822, 834 (Cal. Ct. App.
10 1994); see also *Veal v. Am. Home Mortg. Servicing, Inc. (In re Veal)*, 450 B.R. 897, 917 n.34
11 (9th Cir. BAP 2011) (noting state law may shape the boundaries of "real party in interest"
12 status and collecting cases where California law gives parties the right to foreclose without
interest in the note). California's nonjudicial foreclosure statute provides a "comprehensive
framework for the regulation of a nonjudicial foreclosure sale pursuant to a power of sale
contained in a deed of trust." *Lona*, 202 Cal. App. 4th at 101; *Moeller*, 25 Cal. App. 4th at 834
(comprehensive statutory framework intended to be exhaustive).

13 In order for Claimant to attain the standing of a "beneficiary" under CC § 2924, a
14 "chain of title" must be shown whereby each transferee party attains the status of beneficiary
15 until it transfers and passes the beneficiary status to a new party. These transfers are generally
16 accomplished by assignments, allonges, and/or endorsements. Because there are no allonges or
17 endorsements to Claimant's Promissory Note evidenced in the moving papers, and only one
18 ineffective "Assignment" (Exhibit C) which purportedly "assigns" the Deed of Trust from
19 MERS to Claimant, a legal impossibility, Claimant cannot hold that it has established
20 standing to foreclose. Please see *Barrionuevo v. Chase Bank, NA*, 885 F. Supp. 2d 964 (2012)
21

22 It appears that Claimant depends on the purported "Assignment" to establish beneficiary
23 (standing) status. However, this "Assignment" only attempted to "assign" the Deed of Trust, by
24 itself, without the Promissory Note. There was no attempt to "assign" the Promissory Note, and
25 without the "assignment" of the Promissory Note, the Deed of Trust was ineffective to act as a
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1 security instrument to the Promissory Note and was ineffective to bestow beneficiary status on
2 Claimant. This is because the Note and Deed of Trust are inseparable. The Note is essential. The
3 Deed of Trust is incident to the Note. An assignment of the note carries the mortgage with it
4 while the assignment of the Deed of Trust alone is a nullity. *See Carpenter v. Longan*, 83 U.S.
5 271, 274 (1872); see also *Henley v. Hotaling*, 41 Cal. 22, 28 (1871); *Seidell v. Tuxedo Land Co.*,
6 216 Cal. 165, 170 (1932); CC § 2936. When one party is assigned the Note and another is
7 assigned the Deed of Trust, the holder of the Note prevails. (*Adler v. Sargent*, 109 Cal. 42, 49-50
8 (1895); see also 4 Witkin Summary of California Law, Secured Transaction in Real Property §
9 105 (10th ed).)
10

11
12 Because this alleged "Assignment" assigned only the Deed of Trust, it was a nullity and
13 did not have the effect of awarding beneficiary status, and thus, failed to establish CC §
14 2924(a)(1) standing, and Claimant must establish standing by means other than the February 14,
15 2012, "Assignment" from MERS to Claimant. 1201(b)(21)(A)
16

17 Under Cal. Civ. Code § 2924, the party initiating foreclosure proceedings is not required
18 to have a beneficial or economic interest in the note in order to foreclose. *Lane v. Vitek Real*
19 *Estate Indus. Grp.*, 713 F. Supp. 2d 1092, 1099 (E.D. Cal. 2010); *Castaneda*, 687 F. Supp. 2d at
20 1201 (no requirement that person or entity initiating foreclosure has physical possession of the
21 underlying note); *Candelo v. NDex W., LLC*, 2008 WL 5382259, at *4 (E.D. Cal. Dec. 23, 2008)
22 (same). Instead, a "trustee, mortgagee, or beneficiary, or any of their authorized agents" may
23 commence the nonjudicial foreclosure process. Cal. Civ. Code § 2924(a)(1). (*In re Cedano*, *supra*,
24 at Page 530.)
25

26 In order for Claimant to attain the standing of a "beneficiary" under CC § 2924, a "chain
27
28

1 of title” must be shown whereby each transferee party attains the status of beneficiary until it
2 transfers and passes the beneficiary status to a new party. These transfers are generally
3 accomplished by assignments, allonges, and/or endorsements. Because there are no allonges or
4 endorsements evidenced in the Proof of Claim, and only one ineffective “assignment of a deed
5 of trust” (Exhibit C) which purportedly “assigns” the Deed of Trust from MERS to Claimant, a
6 legal impossibility, Claimant cannot hold that it has established standing. Please see *Barrionuevo*
7 *v. Chase Bank, NA*, 885 F. Supp. 2d 964 (N.D. Cal. 2012)

9 **C. Because the Deed of Trust Attaches to the Note, the June 17, 2010, Purported**
10 **“Assignment” Was Redundant, Null and Void, and Claimant must Find Another Means to**
11 **Establish Standing.**

12
13 As discussed above, Claimant apparently wishes to claim standing as a successor in
14 interest to the Note and Deed of Trust by way of the purported June 18, 2010, “Assignment” from
15 MERS to Claimant. This purported “Assignment” becomes relevant when Claimant asserts it as
16 the basis for standing to initiate foreclosure proceedings.

17
18 As noted above, it is well established law that the assignment of a trust deed does not
19 assign the underlying promissory note and the right to be paid. The security interest is incident
20 of the debt. 4 Witkin Summary of California Law, Secured Transaction in Real Property § 105
21 (10th ed). The Note and the Deed of Trust are inseparable. An assignment of the note carries the
22 mortgage with it, while an assignment of the latter alone is a nullity.” *Carpenter v. Longan*, supra,
23 at p. 274; *Seidell v. Tuxedo Land Co.*, supra, at p. 170; California Civil Code § 2936. Therefore,
24 if one party receives the Note and another receives the Deed of Trust, the holder of the Note
25 prevails regardless of the order in which the interests were transferred. *Adler v. Sargent*, supra,
26
27
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at pp. 49-50 (1895). *See also In re Foreclosure Cases*, 521 F.Supp2d 650, 653 (S.D. Ohio 2007); *In re Vargas*, 396 B.R. 511, 520 (Bankr. C.D. Cal. 2008); *Landmark Nat'l Bank v. Kesler*, 216 P.3d 158 (Kan. 2009); *LaSalle Bank v. Lamy*, 824 N.Y.S.2d 769 (2006).

Because MERS purportedly “assigned” the Deed only, the purported “Assignment” to transfer the Deed of Trust was a nullity and void. Further, though MERS, as the beneficiary makes the purported “Assignment” without the Note, such purported “assignment” was redundant since the Note, as a matter of law, carries with it the Deed of Trust without the necessity of an “assignment”.

VII. THE SECURITIZATION ISSUE

A. Because the Note and Deed of Trust Were Not “Securitized” by True Sale “Assignments” or Endorsements Establishing a Chain of Title from the “Lender/Originator” to the “Seller/Aggregator” to the “Depositor” to the PSA Trust Pursuant to IRC §§ 860A-G, the PSA Trustee Does Not Own or Have a Stake in the Note and Deed of Trust, and, Therefore, Movant Cannot Otherwise Establish That it is a Party in Interest with Authority to Make this Proof of Claim.

Because the purported MERS to Claimant “assignment” (Exhibit C) was ineffective to confer standing on Claimant, Claimant, in order to make its claim, must find another avenue to establish its authority. It has not done so. Claimant submits no other documentation to establish this nexus or “chain of title” that leads the Note and Deed of Trust to the possession of the Claimant.

Upon information and belief, Debtor alleges that the Note and Deed of Trust were subjects of a failed securitization attempt to deposit the Note and Deed of Trust in a PSA Trust, and that

1 the purported October 5, 2010, attempted "assignment" from MERS to Claimant was such a void
2 attempt to deposit the Deed into the PSA Trust. The Claimant does not evidence in its Claim that
3 the PSA Trust exists. (Please see PSA Trust attached as Exhibit D.) This PSA Trust was
4 established on June 1, 2006, pursuant to the terms of the PSA and in compliance with the
5 Internal Revenue Code, and it lists Countrywide Home Loans Servicing LP as the Master Servicer
6 of the PSA Trust who was empowered and required by the PSA to conduct foreclosure
7 proceedings in the event of default in mortgage payments by any one of the thousands of notes
8 and deeds of trusts and/or mortgages that make up the PSA Trust. *See* PSA Trust at ¶ 3.01.

10 "Securitization" is only relevant and important when considering the reason underlying
11 Claimant's failure to mention the PSA Trust in the Proof of Claim. As is described below, had
12 the securitization of the Note and Deed of Trust been accomplished properly, and all things
13 claimed being otherwise true, potentially, a "chain of title" could have been established with the
14 Claimant as the true successor beneficiary with standing to make this Proof of Claim. This did
15 not happen.

18 For the Note and Deed of Trust to be included in the *res* of the PSA Trust, a procedure of
19 sales, transfers, and assignments of the Note must occur. 26 U.S.C. § 860A - G, *et seq.* ("IRC").
20 This process is commonly referred to as "securitization" and these sales, transfers and
21 assignments, if sufficiently documented, establish a chain of title.

23 The process of securitization is a process by which Promissory Notes and Mortgages are
24 bundled or pooled into a trust (PSA Trust) pursuant to a pooling and servicing agreement (PSA).
25 Residential Mortgage Backed securities (RMBS) in the form of certificates ("Certificates")
26 representing ownership interests in the Trust are issued for sale to investors ("Investors"). These

1 RMBS establish in Investors a proportional ownership share of the securitized mortgages of the
2 PSA Trust and its cash flow.

3 The securitization process requires the loan Originator ("Lender") to sell the note and
4 assign the deed of trust to the Aggregator/Seller in a "true sale" transaction. True sale means that
5 the selling party, for actual valuable consideration, releases all interest in the note and endorses
6 it giving up its power to foreclose under the Deed of Trust. The Seller sells the note and assigns
7 the deed of trust to the "Depositor" in a second true sale transaction, again, transferring all
8 beneficial rights to the note and the rights under the Deed of Trust.
9

10 The Depositor sells the note and assigns the deed of trust to the PSA Trust in a true sale
11 transaction. This PSA Trust is known as a REMIC (Real Estate Mortgage Investment Conduit),
12 which is an SPV (Special Purpose Vehicle) that qualifies as a QSPV (Qualified Special Purpose
13 Vehicle) for tax purposes – its earnings are not taxed, but are passed through to the Investors. This
14 process avoids double taxation.(IRC § 860D.) If material non-compliance with the securitization
15 rules are not followed, the REMIC could lose its tax free status. 860G(a)(3)(A)
16

17 Because the PSA Trust was created pursuant to the PSA and in compliance with
18 the Internal Revenue Code, Claimant's acts and deeds in furtherance of the foreclosure sale were
19 required to be in compliance with the terms of the PSA, the New York Codes, and the Internal
20 Revenue Code.
21

22 To maintain the REMIC status whereby RMBS are allowed to be issued, and
23 where the taxation is "passed through" to the Investors, all qualified mortgages under IRC §
24 860G(a)(3)(A) must be purchased by the Trust within three (3) months of the PSA Trust startup
25 day (IRC § 860G(a)(3)(A)(i)). A "qualified replacement mortgage" may be purchased to replace
26
27
28

1 a defective mortgage within two (2) years of the startup day. (IRC § 860G(a)(3)(A)(ii).)

2 Further, Debtor is informed and believes and thereon alleges that a term of the
3 PSA Trust explicitly requires transfer of Notes and Mortgages to be completed within ninety (90)
4 days from the PSA Trust startup date. (See PSA § 2.02.)

5
6 Because the PSA Trust was formed pursuant to New York law, any transfer or attempted
7 transfer to the PSA Trust in violation of the terms of the PSA is void. New York Estates, Powers
8 & Trusts Law section 7-2.4, provides:

9 If the trust is expressed in an instrument creating the estate of the
10 trustee, every sale, conveyance or other act of the trustee in
11 contravention of the trust, except as authorized by this article
and by any other provision of law, is void.”

12 Debtor is informed and believes and thereon alleges that the PSA Trust startup date was
13 June 6, 2006. This means that pursuant to IRC § 860G(a)(3)(A)(i) and New York Estates, Powers
14 & Trusts Law section 7-2.4, as well as the terms of the PSA, September 6, 2006, would have been
15 the last date to transfer the Note and Deed of Trust herein to the PSA Trust.
16

17 Debtor alleges herein that Internal Revenue Code, the New York Estates, Powers & Trusts
18 Law, and the PSA Trust, voids the June 17, 2010, purported “assignment” of Deed of Trust from
19 MERS to Claimant. Debtor claims standing to assert IRC § 860G(a)(3)(A)(i) and New York
20 Estates, Powers & Trusts Law section 7-2.4 and alleges and alleges that the MERS to Claimant
21 purported “assignment” was void, *ab initio*, pursuant to the expressed terms of the New York
22 Estates, Powers & Trusts Law section 7-2.4 and by the implied terms of the IRC §
23 860G(a)(3)(A)(i). In this case, because the startup date of the PSA Trust was June 6, 2006,
24 September 5, 2006, was the latest possible date for deposit of qualified mortgages into the PSA
25 Trust. The purported “Assignment” from MERS to Claimant, as the Master Servicer of the PSA
26 Trust. The purported “Assignment” from MERS to Claimant, as the Master Servicer of the PSA
27 Trust. The purported “Assignment” from MERS to Claimant, as the Master Servicer of the PSA
28

1 Trust, was signed on June 17, 2010, almost four (4) years beyond the three (3) month restrictions
2 for transfers to the PSA Trust imposed by the New York Code and Internal Revenue Code.

3 With all the above in mind, Debtor alleges the following arguments to show that
4 Claimant is not the holder, owner or beneficiary of the Note and Deed of Trust and lacks standing
5 to foreclose whether by judicial or non-judicial process.
6

7 1/ First, the Claimant offers no evidence, *e.g.*, assignments or other
8 indicia of legal transfer from the lender/Originator to the Sponsor/Aggregator, to the Depositor,
9 to the Trustee.

10 2/ Second, assuming, *arguendo*, that it was legally possible to transfer and
11 assign the Deed of Trust from MERS to Claimant, the June 17, 2010, purported "assignment"
12 from MERS to Claimant would still be void, *ab initio*, for the reasons that the attempted transfer
13 and assignment violated the time requirements of the Internal Revenue Code, the PSA Trust and
14 thereby New York law.
15

16 In its Proof of Claim the Claimant does not allege that it claims standing by virtue of the
17 "securitization" process. Instead, it seeks to establish its authority by way of an ineffective alleged
18 MERS to Claimant "assignment". This attempted transfer is void, *ab initio*, and unless Claimant
19 wishes to lose its tax exempt status provided by the provisions of IRC § 860, *et seq.* and destroy
20 the REMIC in the process, it cannot claim by way of the suspect purported "assignment" that
21 Claimant had assumed the status required by CC § 2924(a)(1).
22

23 Apparently, the Claimant avoids mention of the PSA Trust and the securitization process
24 because it cannot produce true sale assignments and/or endorsements between the parties subject
25 to the securitization process. *Barrionuevo v. Chase Bank, NA*, supra, 885 F. Supp. 2d 964.
26
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1 It is apparent Claimant cannot allege its authority to foreclose outside the securitization
2 process and still afford itself of the tax protection provided by the IRC. The Debtor cannot
3 produce the contracts and assignments between the participating banks required by the
4 securitization process. Instead, it now alleges that it obtained standing by virtue of the purported
5 unlawful "Assignment" outside of the securitization process. Debtor is informed and believes that
6 this attempted violation of law and regulation is subject to the sanction jurisdictions of the Internal
7 Revenue Service and the Security Exchange Commission.

8 **VIII. CONCLUSION**

9
10 In summary, even if lawfully legitimate, the Internal Revenue Code requirements for
11 securitization will not allow for the purported "assignment" to be the conduit for the entrance of
12 the Note and Deed of Trust into the PSA Trust.

13
14 It is beyond question that Claimant cannot show an unbroken chain of title in order to make
15 its proof of claim. It cannot be presumed that Claimant has authority to make the proof of claim
16 based on the Claimant's say-so just as it cannot be presumed that Debtor's actions are merely
17 delaying tactics to avoid foreclosure. Widespread securitization of mortgages in the years before
18 the financial meltdown of 2008, triggered at least in part by the often unlawful packaging, selling,
19 repackaging, and reselling of mortgages mostly unseen and poorly understood by homeowners, has
20 changed the financial perspectives and should change the legal perspectives, too.

21
22 The time has come to insist upon regularity in foreclosure proceedings. The time has come
23 to make clear a homeowner's right to challenge a foreclosure based on the foreclosing party's
24 absence of authority to foreclose. "[O]nly the 'true owner' or 'beneficial holder' of a Deed of Trust
25 can bring to completion a nonjudicial foreclosure under California law." *Barrionuevo v. Chase*
26 *Bank, N.A.*, supra, 885 F.Supp.2d at 972.

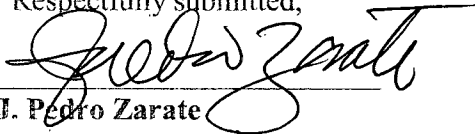
1 Claimant either has the authority to make this claim or it does not. In its proof of claim,
2 it has not presented evidence herein to prove its authority, and it is a simple matter, it either has
3 the proof or it does not. The issue is whether the Court will uphold the integrity of the law or apply
4 its equity powers or allow the claim notwithstanding the fact that no legitimate evidence exists
5 to show that the Claimant is entitled to make the claim against Debtor's estate.³
6

7 The Proof of Claim filed is deficient to show that Claimant is a party in interest with
8 authority to make the Proof of Claim. For this and the above reasons, the Debtor respectfully
9 requests that the claim(s) of the Creditor be disallowed.

10 For this and the above reasons, the Debtor respectfully requests that the claim(s) of
11 the Creditor be disallowed.. Debtor further requests that the Court order that no party without
12 Authority, Due Process and Standing to collect a debt, be allowed to pursue rights against this
13 property of the estate.
14

15 Dated : April 25, 2014.

16 Respectfully submitted,

17 
18 J. Pedro Zarate
19 Debtor In Pro Per

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27 ³ (2012) 41 Stetson L.Rev. 745
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